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HEARSAY EVIDENCE.

One good result of the decision of the English House of Lords in *Sturla v. Freccia*¹ is, that the law relating to evidence, and more especially the branch relating to hearsay evidence, has received an addition of great utility. The matter which the House of Lords was called upon to decide related merely to the admissibility of the report of a committee as evidence of the age and birth-place of a person deceased. It appeared that one Mangini, who had been the Genoese Consul in London in 1790, applied to be appointed to another post for that Government. A committee, called the "Giunta di Marina," was instructed to report, and did report, as to his qualifications. Mangini received the appointment, and died in London in 1803. His daughter and sole next of kin, B, died intestate in London in 1871. In an action brought by various persons claiming to be next of kin to B, it was proposed to put in evidence the above report to prove the age and birth-place of Mangini. Vice-Chancellor Malins held that it was not admissible, and this decision was affirmed on appeal. The appellants urged that it was admissible on three grounds: First, as part of the *res gestæ*; secondly, by force of analogy derived from the doctrine that entries made by deceased persons in discharge of their duty are admissible; and thirdly, as an official document in which action was taken by the Government.

The general rule of English law is, that declarations not made upon oath are inadmissible. To this rule there are many exceptions in which we shall find that hearsay evidence may be admitted. Thus:

1. Documents which appear on their face to be against the interest of a deceased person who made the statements in evidence.

2. Where a deceased person in the course of his duty makes a contemporaneous entry

of something which he has done, and returns that in the course of his business, then after his death it will be received as evidence.

3. Evidence of reputation from deceased persons is admissible in certain cases, where it is proved that the deceased person was of the class who would know, and had made the statement.

4. The oral or written declarations of the deceased members of the family are admissible to prove a pedigree.

In *Doe v. Turford*,² the Court of King's Bench considered some questions which throw light upon *Sturla v. Freccia*. In an action of ejectment it appeared that the defendant was yearly tenant to the plaintiff's lessor, who instructed his solicitor to give defendant notice to quit. Three notices were prepared and three duplicates. The solicitor's partner took the three notices for the purpose of serving them, and returned with the duplicates indorsed by him. Evidence was given that two notices had been duly served upon the tenants for whom they were intended. The other was intended for the defendant. The invariable course of practice in the solicitor's office was for clerks to serve notices to quit on tenants, and to indorse on duplicates of such notices the fact and time of service. The partner died before the trial, and it was debated whether the indorsement on the copy was admissible evidence of the delivery of the notice to the defendant. At the trial Mr. Justice Littledale received it, reserving liberty to the defendant to move to enter a nonsuit, if the court should be of opinion that it ought not to have been admitted. It was urged, on the argument of the rule, that the indorsement was an entry of a deceased agent of the plaintiff's lessor, made contemporaneously with the act in the course of his duty as agent. On the other hand, it was contended that entries or declarations made by deceased persons are admissible to prove facts only when the entry or declaration is against the interest of the party making it, or where it is made in the regular course of business. The rule was discharged. "A minute in writing like the present," said Mr. Justice Taunton, "made at the time when the fact it records took place, by a person since deceased, in the ordinary

¹ 43 L. T. R. (N. S.) 209.

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² 3 B. & Ad. 890

course of his business, corroborated with other circumstances which render it probable that the fact occurred, is admissible in evidence."

The principle of the last case is to be found in such decisions as *Price v. Lord Torrington*.³ That was an action for beer sold and delivered. The draymen were in the habit of coming every night to the clerk of the beer house and giving him an account of the beer they had delivered out, which he entered on a book kept for that purpose, and the draymen set their hands to it. On proof that a particular drayman was dead, an entry in this book signed by him was held good evidence of a delivery to charge the defendant. Again, in an action on a tailor's bill, a shop book was given in evidence, proof being given that the clerk who wrote the book was dead, and that the handwriting was his, and that he had been accustomed to make the entries.⁴ In *Hagsdorn v. Reid*,⁵ the copy of a license in a merchant's letter book, written by a deceased clerk, with a memorandum that the original had been sent to a correspondent abroad, the entries having been proved to have been in the usual course of business, was admitted.

In the House of Lords, Lord Blackburn pointed out in the first place that from no point of view could the *Giunta* be said to have been making statements against their own pecuniary interest, or in the course of business contemporaneous with the fact, and that the question here, viz., the history of a private individual, was not a matter in which in any sense reputation generally could be received. Did the rules relating to evidence of pedigree apply? His lordship admitted that, if Mangini himself had told the committee that he was born at a certain place in a particular year, that would, if genuine, have been almost irresistible evidence. But the only evidence offered was that the committee thought his age and place of birth were at a certain place and time respectively. The rules relating to pedigrees, therefore, did not apply. But was the report a public document? The principle is that the inquiry and document should be a public one, and the document

made by a public officer;⁶ in other words, the document must be made for the purpose of the public making use of it and being able to refer to it. Clearly the report was not a public document in this sense. Lord Watson was of opinion that "in all those cases where secondary evidence is admissible as a substitute for primary evidence, it can only be received when it either plainly appears to be directly drawn from that which would have been primary evidence, or drawn not directly, but by some one competent to infer the result from legal evidence under his consideration." Lord Selborne thought that cases referring to inquisitions of competent public officers, courts, or other persons, who find by inquisition or by visitations, had no bearing on the argument, since it did not appear that the Genoa committee had any legal jurisdiction. Lord Hatherley thought that if the report was admitted, the rule laid down in *Doe v. Turford* would be extended to an alarming extent. The judgment of the court below was affirmed. Perhaps a case on all-fours with *Sturla v. Freccia* may never arise again. Nevertheless, the judgment and reasoning, upon which the decision of the House of Lords proceeded, supply the principles by a reference to which almost any contention with reference to the rules of hearsay evidence may be tested. From that point of view the decision is an extremely valuable one.

LAW REFORM AND JUSTICES OF THE PEACE.

Reform and reform legislation have always been attended with great difficulties. The principle of *stare decisis* has been so deeply rooted in the mind of the lawyer, that any material departure from well-known and long-continued usage would be regarded generally with disfavor. Indeed reformers are looked upon, almost universally, as innovators and revolutionists in the government of the law. It is natural that old lawyers, grounded in the principles of the common law, should consider any change in the system in which they are versed as a legal sacrilege; and it is equally natural that the young men of this generation should discountenance many of its useless and arbitrary distinctions, which owe their continued observance alone to their precious antiquity. Macaulay tells of a general who preferred to lose a battle by fighting according to

³ 1 Salk. 285.

⁴ *Pitman v. Maddox*, 2 Salk. 690.

⁵ 3 Camp. 379.

⁶ *Irish Society v. Bishop of Derry*, 12 Cl. & F. 164.

rule, than to win it by innovation. It is to be hoped that no lawyer would care to sacrifice the rights of his clients by such patriotic devotion to the curious and obsolete whims of forgotten legislators. The trouble is, as Mr. Pomeroy well puts it, that reform has been too radical to cause the results anticipated by its authors. It has everywhere met with strenuous opposition. This was certainly the case in the early part of this century, and even now we read the works of those writers with a good deal of the feeling with which we regard iconoclasts. We can not tamely submit to see our system of laws, however faulty, held up to ridicule without defending it. When De Tocqueville tells us that we accord too much deference to the opinions of our forefathers, we retort by saying that his countrymen go to the other extreme; that precedent forms little or no part of their law. When Jeremy Bentham says, "the English law is, a great part of it, of such a nature as to be bad everywhere;" or "that is called unwritten law which consists of rules of jurisprudence, is a law which governs without existing; the learned may exercise their ingenuity in guessing at it, the unlearned can never know it" (Vol. 1, pp. 167, 185);—we are ready to refute the allegation and denounce the author. There may have been reason for his strictures. His mission seemed to have been, however, to detect the defects of the law; but from exceptional cases he drew such general conclusions as were altogether unwarrantable. For instance he would say, if A assaults B and injures him, B has an action against him; but if A assaults B and kills him, the principle of *personalis actio moritur cum persona* governs, and no action lies even by the heirs of B—a defect which has been remedied by subsequent statutes. The existence of such a defect was an indication perhaps of an imperfect system, but did it warrant the conclusion reached that the law was bad pretty much everywhere? The law was lately in England, and may be so now, that while an action lies by a master for injury to his servant causing a temporary interruption of the term of service, none lies by the master in case the service is permanently discontinued by such an injury as causes the servant's death, (*Osborn v. Gillett*, L. R. 8 Ex. 88) and many other instances of the kind might be cited. But even if Mr. Bentham himself had formulated a code such as he desired, it can scarcely be believed that it would have been entirely free from faults, for the reason that no system of laws can be perfect. There are new cases arising every day calling for new remedies, and it is as impossible for legislators to anticipate and provide for possible contingencies, as to foretell the future. When the object of reform, however, is to remedy existing evils, and when it is actuated by no mean spirit, we can not see why it should be sneered at by those who recognize the evil themselves, and yet have come to regard it as a disagreeable necessity to which they must submit.

The object of this article is to make a few suggestions concerning one of the standing abuses in the composition of our courts. We refer to the

tribunals presided over by the so-called Justices of the Peace. They were of English origin, and under the English law, according to Blackstone, they consisted of "two or three men of the best reputation in each county;" and he says: "Because men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI. ch. 11, that no Justice should be put in commission if he had not lands to the value of £20 per annum; and by statute 5, Geo. II, ch. 18, that every Justice shall have £100 per annum, clear of all deductions." Black. Com. vol. 1, ch. 9. According to the Constitution of Ohio—and it is much the same in all of the States—the only qualification prescribed for eligibility is that the candidate must be an elector, "must possess the qualifications of an elector." Ohio Const. art. 15, § 4. "No provision in regard to the residence of a candidate at the time of the election seems to be made by law, except that he must be an elector." Swan's Treatise. Under such a provision, is it to be wondered at, that Justices' Courts have no standing whatever in the community? It has come to be a fact well recognized by all, whether within or without the profession, that the very name is a farce upon its face. Clients when sued in Justices' Courts tell their counsel to waive the trial, as they have no hope for justice there. "It would make a difference of course," said one, "if I were the plaintiff in this case; as it is, I am the defendant, and though I have a good defense, the claim is barred by the statute of limitations, I might as well give bond and carry it up." But suppose in a case of this kind the client is unable to give the necessary bond, or judgment having gone against him, is unable to carry it to the higher court—where is his remedy then? He has none, and is compelled to respond to the judgment of the court in addition to paying his attorney's fees, without having had a fair trial by a proper tribunal; and if he has a moral as well as a legal defense, the greatest injustice has been done.

There is no doubt but that a great part of the litigation in large cities originates in Justices' Courts; their jurisdiction being comparatively extensive, and concurrent to a certain extent with that of courts of record, resort is had to them in the first instance. It is highly necessary then that those courts should be properly constituted in order that the rights of the litigants may be fairly determined, and determined once for all. It would not be unsafe to say that the majority of these courts are presided over by ward politicians and "shysters;" men without standing, property or principle. Why this should be the case, is not easy to see. It is true the positions are somewhat inferior, but the emoluments connected with them are said to be large, dependent, of course, upon the amount of business done, which in great cities is often considerable. When it is considered that important questions are frequently brought up before these courts—courts which have jurisdiction of certain provisional remedies in the first instance, the speedy termination of which is ab-

solutely essential to the ends of justice, the necessity of having men of integrity and ability, especially men educated in the law, to fill such positions, is at once recognized. It is well known that few have ever been admitted to the bar; that many of them have not even had a common-school education, is apparent enough. If it were possible to give dignity to the office, to raise the standard of qualifications for eligibility, to provide by legislation that candidates be lawyers of standing and respectability; if not of property, in the community in which they are chosen, some progress toward a long needed reform in the constitution of such courts would be attained.

It has been suggested that cities be divided up into districts, just as *arrondissements* in Paris, over which the Justices may have jurisdiction; that their number and jurisdiction be limited, the positions salaried, and candidates chosen from among the profession.

THE EMPLOYERS' LIABILITY ACT.

We give below the text of the English statute passed at the last session of Parliament and known as the Employers' Liability Act. It is intended to place the liability of a master for injuries to his servant on a more certain footing, than the contrary and conflicting decisions on the subject have established as the common-law rule. It is regarded as a victory to some extent of the advocates of the rights of the employee as against the employer; but its justice and policy being merely experimental, it is restricted by its terms to a period of seven years from its passage. It goes into operation on the 1st day of January, 1881, and will be of interest to the American lawyer, as the conclusions which have been reached by the English bar and by Parliament, after a careful consideration of the state of the common law upon the liability of a master for injuries to his servant.

Sec. 1. Amendment of Law.—Where, after the commencement of this act, personal injury is caused to a workman

- (1.) By reason of any defect in the condition of the ways, works, machinery or plant, connected with or used in the business of the employer; or,
- (2.) By reason of the negligence of any person in the service of the employer who has any superintendence intrusted to him whilst in the exercise of such superintendence; or
- (3.) By reason of the negligence of any person in the service of the employer, to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed; or
- (4.) By reason of the act or omission of any person in the service of the employer, done or made in obedience to the rules or by-laws of the employer, or in obedience to particular instructions given by any person delegated with the authority of the employer in that behalf; or

- (5.) By reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway,

the workman, or in case the injury results in death, the legal personal representatives of the workman, and any person entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work.

Sec. 2. Exceptions to Amendment of Law.—A workman shall not be entitled under this act to any right of compensation or remedy against the employer in any of the following cases, that is to say:

- (1.) Under sub-section one of section one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the employer, or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.
- (2.) Under sub-section four of section one, unless the injury resulted from some impropriety or defect in the rules, by-laws or instructions therein mentioned; provided that where a rule or by-law has been approved or has been accepted as a proper rule or by-law by one of Her Majesty's principal Secretaries of State, or by the Board of Trade or any other department of the government, under or by virtue of any act of Parliament, it shall not be deemed for purposes of this act to be an improper or defective rule or by-law.
- (3.) In any case where the workman knew of the defect or negligence which caused his injury, and failed within a reasonable time to give, or cause to be given, information thereof to the employer or some person superior to himself in the service of the employer, unless he was aware that the employer or such superior already knew of the said defect or negligence.

Sec. 3. Limit of Sum Recoverable as Compensation.—The amount of compensation recoverable under this act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury.

Sec. 4. Limit of Time for Recovery of Compensation.—An action for the recovery under this act of compensation for an injury shall not be maintainable, unless notice that injury has been sustained is given within six weeks, and the action is commenced within six months from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death: *Provided*, always, that in case of death the want of such notice shall be no bar to the maintenance of such action, if the judge shall be of opinion that there was reasonable excuse for such want of notice.

CRIMINAL LAW — ATTEMPT TO POISON INTENT.

STABLER V. COMMONWEALTH.

Supreme Court of Pennsylvania, October, 1880.

S having a grievance against W, solicited N to put poi-

son in W's spring, so that the latter would be poisoned, and offered him a reward for so doing. N refused, and handed the package of poison back to S, but afterwards discovered it in his pocket. *Held*, that S could not be convicted of an attempt to commit murder by poisoning.

Error to the Court of Quarter Sessions of Allegheny County.

MERCUR, J., delivered the opinion of the court:

This indictment contains six counts. A conviction was had on the first and sixth, and sentence was pronounced on each separately. The first charges a felonious attempt to administer poison to one Waring, with intent to commit the crime of murder, and feloniously to kill and murder him; the sixth, with wickedly soliciting one Neyer, to administer poison to said Waring. No error is now alleged to the conviction and judgment on the sixth count. The conviction on the first, and the judgment thereon, are assigned for error. This count is framed under sec. 82 of the Act of 31st March, 1860, Pur. Dig. §340. It declares: "If any person shall attempt to administer any poison or other destructive thing, or shall attempt to cut, or stab or wound, or shall shoot at any person, or shall by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate or strangle any person, with intent, in any of the cases aforesaid, to commit the crime of murder, he shall, although no bodily injury be effected, be guilty of felony, and be sentenced to pay a fine of one thousand dollars and undergo an imprisonment by separate or solitary confinement, not exceeding seven years."

All the testimony to prove the first count was the evidence of Neyer. He testified to a conversation which he had with Stabler, more than a year before the information was made against him. His testimony is substantially this: Stabler stated his grievance against Waring and a determination to be revenged. He solicited witness to put poison in Waring's spring, so that the latter and his family would be poisoned, offering him a reward for so doing. He handed witness the poison and directed how it should be administered. Witness replied he would have nothing to do with it, and handed the poison back to Stabler. While they were conversing, the coat of witness was off; on putting it on, three or four days thereafter, he found a package in the pocket, and believed it to be the one that Stabler had handed him. Soon after this, witness left the State, and did not return until about a year thereafter. He then for the first time related the conversation to a person, and handed him the package of poison. He further testified that he never had any intention of administering the poison, and never did any thing towards it, and had no other conversation with Stabler about the matter.

Is this evidence sufficient, within the meaning of the statute, to prove an attempt on the part of Stabler, to administer the poison? The act recog-

nizes a distinction between intent and attempt. The former indicates the purpose existing in the mind, the latter, an act to be committed. Merely soliciting one to do an act is not an attempt to do that act. *Rex v. Butler*, 6 C. & P. 368; *Smith v. Commonwealth*, 54 Pa. St. 209. In this last case it was said: "In a high moral sense it may be true that solicitation is attempt, but in a legal sense it is not." In some cases it has been held, although a solicitation to commit a misdemeanor does not constitute an attempt to commit the misdemeanor, yet a solicitation to commit a felony does constitute an attempt to commit the felony. This view does not appear to have been adopted in Pennsylvania. The case of *Kelly v. Commonwealth*, 1 Grant, 484, was an indictment for murder, charged to have been committed in an attempt to commit a rape. It was held that acts were necessary to constitute an attempt. That an attempt to commit a rape was an ineffectual offer by force with intent to have carnal knowledge. If such acts, with such intent, were not proved, the prisoner could not be convicted of the attempt, that it should be an actual, not a constructive attempt. An intent to commit fornication was insufficient.

In the present case, it is contended that putting the poison into the pocket of the witness was an act sufficient to constitute the attempt, if Stabler expected and believed it would be used as he had requested. The uncontradicted evidence is, that it was so put without the knowledge of the witness, and after his positive and unqualified refusal to use it. He swears he never used it, or attempted to use it, or had any intention of so doing. To submit to the jury to find that Stabler expected and believed that the witness would administer it, was not only without evidence but against the evidence. If, however, it was actually delivered with that intent, we do not think it constituted an attempt to murder under the 82d sec. of the Act of 31st March, 1860. This section is substantially a copy of the third section of the Act of 1 Vic., ch. 85. In an indictment under that act, in *Regina v. Williams*, 1 Car. & K. 589, it was held that the delivery of poison to an agent with directions to him to cause it to be administered to another, was insufficient to establish an attempt to murder.

So on an indictment under the same chapter, for attempting to discharge loaded fire-arms at a person, it was held in *Regina v. Lewis*, 9 C. & P. 523, that some act must be shown to prove that the person did attempt to discharge the fire-arms, and merely presenting them is not sufficient. Upon an indictment for attempting to discharge a pistol loaded with powder and ball with intent to murder, a witness testified: "The prisoner took out a small pistol and said: 'I will settle you,' or 'I will do you,' and either half or full cocked the pistol, and pointed the muzzle at my brother," with his finger on the trigger; yet it was held the charge of felony could not be supported, as it was not proved that the prisoner drew the trigger. *Reg. v. St. George*, Id. 483, (38 E. C. L. R.) Parke, B., said: "Here a trigger was to be drawn, and it was not drawn. It seems to me the object of this

act was to punish proximate attempts, that is, those attempts which immediately lead to the discharge of loaded arms." It is true, in *People v. Bush*, 4 Hill, 133, a conviction was sustained for an attempt to commit a felony, where the act proved was as remote from the crime intended to be perpetrated, as the act proved is in the present case. That ruling, however, rests on a statute of New York which contains language not in the Act of 1 Vic. cited, nor in our own statute. It has the additional words, "and in such attempt shall do any act toward the commission of such offense." In giving construction to a statute containing such language, a conclusion may well be reached, that would be forced and unjust in constraining our statute which is so different.

The conduct of the plaintiff in error, as testified to by the witness, undoubtedly shows an offense for which an indictment will lie without any further act having been committed. He was rightly convicted therefor on the sixth count. We, however, think, all that occurred at the interview with the witness and the legal inference deducible therefrom, followed by no other act, are not sufficient to justify a conviction for an attempt to commit the felony as charged. The act proved did not approximate sufficiently near to the commission of murder to establish an attempt to commit it within the meaning of the statute. The second and third assignments are sustained, and on the first count. Judgment reversed.

STERRETT, J., dissents.

GRAND JUROR NOT LIABLE TO CIVIL ACTION.

TURPEN v. BOOTH.

Supreme Court of California, September, 1880.

A grand juror is not liable in damages for returning an indictment against another, even where he acts upon insufficient evidence, and with a malicious desire to injure the person against whom the indictment is found.

Appeal from the District Court of the Fifth Judicial District, Stanislaus County.

W. E. Turner, for appellant; *Geo. W. Schell*, for respondents.

MORRISON, C. J., delivered the opinion of the court:

The complaint in this case avers that in the month of March, 1877, the defendants, and each of them, were duly, legally and in the manner and form prescribed by law, regularly impaneled and sworn by the County Court of Stanislaus County to serve as grand jurors for the term. That they, and each of them, took the oath prescribed by law that "they would present no person through malice, hatred or ill-will;" but that, notwithstanding said oath, the defendants, and each of them, wilfully disregarding such oath, and being actuated and influenced by a desire and with a determination to forever blast, tarnish

and ruin the good name and reputation theretofore held and enjoyed by the plaintiff among his fellows and acquaintances, did wilfully, wantonly and maliciously conspire together, and under the pretense of doing and performing their duties as members of said grand jury, pretend to receive and hear evidence against the plaintiff in a certain matter wherein the plaintiff was charged with illegal voting at the general election held in this State on the 7th day of November, 1876. And after the hearing of such evidence, notwithstanding they, as such grand jurors, were positively instructed by the law officer of the county that no indictment could lie against the plaintiff upon said evidence, and that, according to the evidence, no crime whatever had been committed, and that no conviction could be had thereon—and notwithstanding the fact that no evidence had been produced, testified to, or heard before said defendants, as such jury, in any manner implicating the plaintiff in the commission of said or any crime—these defendants, as such grand jury, collectively and individually, wilfully, falsely and fraudulently, and without probable cause, and being possessed of actual malice and ill-will against this plaintiff, and for the sole purpose as aforesaid, corruptly did pretend to find a true bill and indictment against this plaintiff for falsely and illegally voting, etc.; and such indictment was duly presented by the foreman of the grand jury, and was filed according to law. That said defendants, as such grand jurymen, well knew at the time there was accessible to them an overwhelming amount of testimony which would clearly show that the charge of illegal voting against this plaintiff was false and malicious, and without any foundation whatever; but they, so that they might the easier carry out their malicious design upon plaintiff, wilfully and maliciously refused to call in or hear said testimony. That upon the indictment so found and presented by the defendants, the plaintiff was tried and acquitted, the trial jurors not leaving their seats."

We have stated sufficient averments of the complaint to show that the action is brought for the recovery of damages by a person against whom an indictment was found by the defendants acting as grand jurors of the County of Stanislaus, the gravamen of the action being the malicious conduct of said defendants in finding and presenting such indictment.

It is claimed in the first place, that the evidence upon which the defendants found the indictment was insufficient to justify such a finding; and, in the second place, it is charged that there was exculpatory evidence which they refused to hear. The case presents the simple question whether a grand juror is answerable civilly for damages for an act done by him as such grand juror, in a case where he acts upon insufficient evidence and with a desire maliciously to injure the party against whom the indictment is found. The question is an interesting one, and this is the first case in which it has been presented in the Supreme Court of this State.

It is claimed on behalf of the defendants that

they are not liable, because the statute so declares, and that, independent of any statute on the subject, they are exempt from all liability by the principles of the common law.

Sec. 927 of the Penal Code provides that "a grand juror can not be questioned for anything he may say, or any vote he may give, in the grand jury relative to a matter legally pending before the jury, except for a perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow-jurors." The plain import and meaning of the above language is, that no grand juror shall be held liable for damages in a civil action for anything done by him in the grand jury room; and this is but a statutory declaration of the principle as it existed at common law. In Wharton's American Criminal Law, vol. 1, sec. 509, it is said that "in no case can a member of a grand jury be obliged or allowed to testify or disclose in what manner he, or any other member of the jury, voted on any question before them, or what opinions were expressed by any juror in relation to any such question." "The secret inquisitorial proceedings of the grand jury may, as they often have, work very oppressively and unjustly; for only so far as guarded and restrained by an oath, their action is generally irresponsible and conclusive in finding an indictment. During the whole of their proceedings they are protected in the discharge of their duty; and no action or prosecution can be maintained, no matter how they may be actuated by malice or indiscretion." Proffatt on Jury Trial, sec. 55. "Nor can an action be maintained against a jurymen, or the attorney-general, or a superior military or naval officer, for an act done in the execution of his office, and within the purview of his general authority." 1 Chitty on Pleading, 89. "But I prefer to place the decision on the broad ground that no public officer is responsible, in a civil suit, for a judicial determination, however erroneous it may be, and however malicious the motive which produced it. Such acts, when corrupt, may be punished criminally; but the law will not allow malice and corruption to be charged in a civil suit against such an officer for what he does in the performance of a judicial duty. The rule extends to judges from the highest to the lowest; to jurors, and to all public officers, whatever name they may bear, in the exercise of judicial power. It of course applies only when the judge or officer had jurisdiction of the particular case, and was authorized to determine it. If he transcends the limits of his authority, he necessarily ceases, in the particular case, to act as a judge, and is responsible for all consequences. But with these limitations, the principle of irresponsibility, so far as respects a civil remedy, is as old as the common law itself. The authorities on this subject are almost innumerable." Weaver v. Devendorf, 3 Denio, 120, 121, and the numerous authorities there referred to.

The recent case of Bradley v. Fisher, 13 Wall. 335, is a very learned and instructive one on this question. That was an action brought by Bradley against Judge Fisher to recover damages al-

leged to have been sustained by the plaintiff "by reason of the wilful, malicious, oppressive and tyrannical acts and conduct of the defendant, whereby the plaintiff was deprived of his right to practice as an attorney in the Supreme Court of the District of Columbia." The plaintiff used some threatening language to the defendant out of court for his conduct as judge, pending the trial of a cause, and the defendant therefor struck the plaintiff's name from the roll of attorneys practicing in that court. Mr. Justice Field, in delivering the opinion of the court, carried this principle of exemption to its utmost limits, and beyond the limit laid down by the Supreme Court of New York in the case in 3 Denio, 120. The Supreme Court of the United States there held "that judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly—a distinction as to their liability being made, between acts done by them in excess of their jurisdiction, and acts done in the clear absence of all jurisdiction over the subject-matter."

The case of Downer v. Lent, 6 Cal. 94, is also in point. The court say: "It is beyond controversy that the power of the Board of Pilot Commissioners is *quasi* judicial, and that they are not civilly answerable. They are public officers to whom the law has intrusted certain duties, the performance of which requires the exercise of judgment."

This is equally true of grand jurors. They have certain duties to perform under the law of a *quasi* judicial character; and in the performance of such duties the law invests them with judgment and discretion. The grand jury was an essential part of the machinery of the county court. They were not volunteers, but were engaged in the performance of a duty that was compulsory. In finding the indictment complained of, they acted within the legitimate sphere of their duty, and cannot be held civilly responsible. What is said by the learned judge in the case of Scott v. Stansfield, L. R. 3 Ex. 220: "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences," is applicable to this case.

To hold grand jurors liable for damages in civil actions would be against the policy of the law, and we find no authority in the adjudged cases for so holding. Judgment affirmed.

UNCONSTITUTIONALITY OF STATUTE CONFIRMING ILLEGAL TAX SALES.

FORSTER V. FORSTER.

Supreme Judicial Court of Massachusetts, November Term, 1879.

The Supreme Court having on February 8, 1878, decided that a tax collector, had no authority to sell an

undivided interest in the land, so as to constitute the purchaser a tenant in common with the owner; and that when the only previous notice was that the land or such undivided part thereof as might be necessary, would be sold, any sale, although of the entire parcel of land, was void—on May 6, 1878, the legislature passed a statute, to take immediate effect, in these words: "No sale heretofore made of real estate taken for taxes shall be held invalid by reason of the notice of sale having contained the words, 'or such undivided portion thereof as may be necessary,' or the words, 'or such undivided portions of them as may be necessary;' provided, however, that this act shall not apply to any case wherein proceedings at law or in equity have been commenced involving the validity of such sale, nor to any real estate which has been alienated since the 8th day of February of the current year, and before the passage of this act." Held, that this statute was unconstitutional and void.

GRAY, C. J., delivered the opinion of the court:

By the Gen. Stats. ch. 12, §§ 28-30, the collector, before selling real estate for taxes, is required to publish and post a notice of the time and place of sale, containing, among other things, a substantially accurate description of the several rights, lots or divisions of the estate to be sold. By § 33, if the taxes are not paid, he is required, at the time and place appointed for the sale, to sell by public auction so much of the real estate, or the rents and profits of the whole estate for such term of time, as shall be sufficient to discharge the taxes and necessary intervening charges; he is allowed at his option to sell the whole or any part of the land; and is directed, after satisfying the taxes and charges, to pay the residue of the proceeds of the sale, if any, to the owner of the land.

In *Wall v. Wall*, 124 Mass. 65, decided on February 8, 1878, it was adjudged by this court, that the collector had no authority to sell an undivided interest in the land, so as to constitute the purchaser tenant in common with the owner; and that, when the only previous notice was that the land or such undivided part thereof as might be necessary would be sold, any sale, although of the entire parcel of land, was void.

On May 6, 1878, the Legislature passed a statute, to take immediate effect, in these words: "No sale heretofore made of real estate taken for taxes shall be held invalid by reason of the notice of sale having contained the words 'or such undivided portion thereof as may be necessary,' or the words 'or such undivided portions of them as may be necessary;' provided, however, that this act shall not apply to any case wherein proceedings at law or in equity have been commenced involving the validity of such sale, nor to any real estate which has been alienated since the 8th day of February of the current year, and before the passage of this act." Stat. 1878, ch. 229.

The question presented and argued in each of these six cases is, whether this statute is constitutional and valid as applied to sales, no suit involving the validity of which had been commenced before its passage, and where the real estate sold had not been alienated between February 8, 1878, and the passage of the act.

After mature advisement, and careful examination of the numerous cases cited at the bar, and giving due weight to the strong presumption in favor of the validity of every act of the Legislature, all the judges feel themselves compelled by their judicial duty to declare that the statute in question exceeds the constitutional authority of the legislature in two important respects.

First. The statute assumes to take away private property, without due process of law, and without compensation. While it is doubtless the duty of the citizen to pay all taxes legally assessed upon him for the support of the government, yet the validity of proceedings taking his land against his will in discharge of his tax depends upon no considerations of equity, but upon a strict compliance on the part of the municipal officers with the regulations previously prescribed by the statute, in the double purpose of securing the payment of the tax and of protecting the citizen against unnecessary sacrifice of his property. The statute under which the sales in question were made was framed to carry out this purpose, by authorizing the collector to sell the whole land, or, if it was capable of division, any part of it, but giving him no power to sell an undivided interest therein. The notices given did not comply with those statutes, because they left it in doubt whether the collector intended to sell the whole of the land, as he lawfully might, or to sell an undivided part thereof, which he had no right to do. When such a notice is the only notice given, it can not be presumed that the land brought an adequate price at the sale; for persons who might be ready to purchase the whole land might well be unwilling to purchase an undivided share, which would make them tenants in common with a stranger, and might for that cause not attend the sale; and by reason of their absence, and for want of their bids, the price obtained might be the less, even if the collector should finally determine, at the moment of the sale, to put up and sell the whole lot.

Second. The statute is an attempt to exercise judicial power by the legislature. It does not change the law for the future, nor establish a uniform rule for the past. While it undertakes to confirm past sales made upon an illegal and insufficient notice, if no litigation has arisen concerning their validity, and the land has not been alienated since the decision of this court in *Wall v. Wall*, it leaves sales already in litigation, or of lands which have been alienated since that decision, in the same condition in which they were before the statute was enacted. Its purport is to let the law, as declared by the decision of this court, apply to all future sales, and to all past sales coming within the two excepted classes; but as to all other sales already made, to reverse the rule of law so declared and to overrule that decision. It in effect declares that the title to land shall depend upon the questions whether a suit to recover it has or has not been already commenced; whether the person who owned it at the time of the sale for taxes, relying on the terms of the statutes under which the sale was made, as show-

ing that his title was unaffected thereby, or on the decision of this court as establishing that title, has kept his land, or has parted with it; and whether his grantee succeeded to his title before or since that decision. To illustrate: Illegal sales for taxes have been made of two lots of land; the owner of one of them has brought an action to recover it before the passage of the statute; the owner of the other has not; the first recovers his land, the second loses it. Again: The owner of one lot had alienated it before the decision in *Wall v. Wall*, or has kept it himself; the owner of the other lot has alienated it since that decision; in the first lot, the title of the owner or of his grantee is defeated; in the second, the title of the grantee is good.

We find it impossible to reconcile this statute with the fundamental principles declared in the Constitution of the Commonwealth, that every subject has the right to be protected in the enjoyment of his property according to standing laws; that his property shall not be appropriated, even to public uses, without paying him a reasonable compensation therefor; that he shall not be deprived of his property or estate, but by the judgment of his peers or the law of the land; and that the legislative department shall never exercise the judicial power. Declaration of Rights, Arts. 10, 12, 30. There is nothing in the previous decisions of this court that requires or warrants a different conclusion. But as the scope and extent of some of those decisions have been misunderstood, a brief review of them may be convenient.

In *Grafton Bank v. Bickford*, 13 Gray, 564, proceedings in insolvency, had in a county in which the office of judge of insolvency was vacant, before the judge of insolvency of an adjoining county, were stayed by this court, upon the ground that it was not a case in which the judge of insolvency of the county was "from sickness, absence or other cause, unable to perform the duties required of him," within the meaning of the statute of 1856, ch. 284, § 5. The legislature afterwards undertook to confirm all proceedings in insolvency so had, so far as they might be invalid for want of jurisdiction or authority in the judge. Stat. 1860, ch. 78. But that statute was held by this court to be unconstitutional, and therefore inoperative and void, not merely as to the proceedings which had been stayed by the former judgment of this court, but likewise as to similar proceedings in other cases. *Denny v. Mattoon*, 2 Allen, 360; *Fayerweather v. Dickinson*, 2 Allen, 385, note. In *Bacon v. Calender*, 6 Mass. 303, in which a statute, which provided that in actions to recover lands which the tenant "now holds by virtue of a possession and improvement," he should be allowed to hold for his improvements, was applied to actions pending at the time of its passage, the court only held that the statute was as applicable to such actions as to those brought afterwards, and expressly reserved its opinion upon the general constitutionality of the statute, because that point had not been argued. In *Albee v. May*, 2 Paine, 74, a similar statute was upheld merely because

the Constitution of the State of Vermont, in which the land was, contained no provision applicable to the case. But in other States, under constitutional provisions like those of our Declaration of Rights, such statutes have been held unconstitutional as applied to titles already vested. *Austin v. Stevens*, 24 Maine, 520; *Lambertson v. Hogan*, 2 Pa. St. 22. See also *Society for Propagation of Gospel v. Wheeler*, 2 Gallison, 105; *Webster v. Cooper*, 14 How. 488. The early cases of *Walter v. Bacon*, 8 Mass. 468; *Patterson v. Philbrook*, 9 Mass. 151; and *Locke v. Dane*, 9 Mass. 360, in which statutes confirming acts of the Courts of Sessions extending the limits of jail yards beyond the land of the county and the highways adjoining, which had been held by this court in *Baxter v. Taber*, 4 Mass. 360, to be illegal, were allowed a retrospective operation upon bonds already given for the liberty of the jail limits, and even where the debtor had gone beyond the legal jail limits before these statutes were passed, appear to have overlooked the distinction between the defining of those limits for the future, which might well be held to be within the rightful authority of the legislature, and the meaning of the previous bonds, and the taking away of rights of action upon such bonds which had accrued before the passage of the statute. To the extent of taking away such rights of action, they have not been approved in later cases. *Reed v. Fullam*, 2 Pick. 159; *Simmons v. Hanover*, 23 Pick. 188, 194; *Davison v. Johannot*, 7 Met. 396; *Wildes v. Vanvoorhis*, 15 Gray, 139, 148; *Denny v. Mattoon*, 2 Allen, 385.

General statutes changing joint tenancies into tenancies in common, the validity of which has been upheld as applied to tenancies existing at the time of their passage, merely cut off future rights of survivorship, and, while they give the tenant who dies first a more beneficial tenure than he had before, take nothing from the survivor which his co-tenant might not himself defeat in his life time, by conveying his own interest to a stranger, or by suing for partition. *Miller v. Miller*, 16 Mass. 59; *Burghardt v. Turner*, 12 Pick. 534, 539; *Dunn v. Sargent*, 101 Mass. 336, 340; *Bambaugh v. Bambaugh*, 11 S. & R. 191; 4 Kent Com. 363, 364. Special resolves of the Legislature, authorizing the sale of land of minors or of trust estates, and the investing and holding of the proceeds upon the same uses and trusts as before, have been sustained as merely providing for a change of investment. *Rice v. Parkman*, 16 Mass. 326; *Davison v. Johannot*, 7 Met. 388; *Sohier v. Massachusetts Hospital*, 3 Cush. 483; *Clarke v. Hayes*, 9 Gray. 426; *Watkins v. Holman*, 16 Pet. 1.

In *Foster v. Essex Bank*, 16 Mass. 245, the point decided was that a statute continuing corporations in existence for three years after the time limited by their charters, for the purpose of suing and being sued, might constitutionally apply to existing corporations. In *Simmons v. Hanover*, 23 Pick. 188, the only question was whether this court could entertain jurisdiction of a bill in equity under a statute passed after the filing of the bill and in terms ratifying proceedings al-

ready had. In each of those cases, the statute affected no vested right, but matter of remedy only.

The other cases in which retrospective statutes have been sustained in this court and in the Supreme Court of the United States, (without considering whether all of the latter which arose in other States could have been decided in the same way under the Constitution of this Commonwealth), are distinguishable from the cases at bar, and may be classified as follows: 1st. Cases of statutes confirming sales of land under order of court for an adequate consideration, where there was a want of jurisdiction in the court, or the deed was irregularly made to another person than the actual bidder, or the sale was after the time limited in the license, or the confirming statute was passed upon the petition of all parties having the legal title. *Wilkinson v. Leland*, 2 Pet. 627, 661, and 10 Pet. 294; *Kearney v. Taylor*, 15 How. 494; *Cooper v. Robinson*, 2 Cush. 184, 190; *Sohier v. Massachusetts Hospital*, 3 Cush. 483. 2d. Statutes confirming conveyances by an executor or trustee under a will, where the only objection was to the manner of his previous appointment and giving bond, which might perhaps not be open to be contested in a collateral proceeding, even if no such statute had been passed. *Weed v. Donovan*, 114 Mass. 181; *Bradstreet v. Butterfield*, 129 Mass.; *Bassett v. Crafts*, 129 Mass. Such statutes are somewhat analogous to those confirming deeds acknowledged before a person acting as magistrate, whose commission as such had expired, which could not have been questioned collaterally, he being an officer *de facto*. *Brown v. Lunt*, 37 Maine, 243; *Denny v. Mattoon*, 2 Allen, 384; *Sheehan's Case*, 122 Mass. 445, 447; *Hussey v. Smith*, 99 U. S. 20, 24. 3d. Statutes curing defects in the execution of private deeds and instruments, so as to give them effect according to the intention of the parties and the equities of the case. *Randall v. Creiger*, 23 Wall. 137; *Wildes v. Vanvoorhis*, 15 Gray, 139; *Denny v. Mattoon*, 2 Allen, 377, 378, 383. 4th. Statutes confirming votes of towns for municipal or public purposes, which are within the paramount control of the legislature. *Thompson v. Lee County*, 3 Wall. 327; *Beloit v. Morgan*, 7 Wall. 619; *Guilford v. Supervisors of Chenango*, 13 N. Y. 143; *Allen v. Archer*, 49 Maine, 346; *Freeland v. Hastings*, 10 Allen 570. 5th. Cases in which the only point before the court was whether the statute in question contravened the Constitution of the United States, as being an *ex post facto* law, or a law impairing the obligation of contracts. *Calder v. Ball*, 2 Dall. 386; *Satterlee v. Matthewson*, 2 Pet. 380; *Watson v. Mercer*, 8 Pet. 88; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Baltimore & Susquehanna Railroad v. Nesbit*, 10 How. 395; *Carpenter v. Pennsylvania*, 17 How. 456; *Florentine v. Barton*, 2 Wall. 210.

The other cases in the courts of the various States, cited in argument, afford no precedent for the action of the legislature in the cases before us, depend much upon the Constitutions and usages of the several States, and cannot be exam-

ined in detail without extending this opinion to too great a length.

Appropriate judgments and decrees are ordered in the several cases.

ABSTRACTS OF RECENT DECISIONS.

ENGLISH, IRISH AND CANADIAN CASES.

HORSE—CONDITIONAL SALE—DEATH OF HORSE BEFORE SALE ABSOLUTE.—A horse was sold by the plaintiff to the defendant on condition that it should be taken away by the latter and tried by him for six days, and then returned if the defendant did not think it suitable to his purposes. The horse died (through no fault of either party) three days after it had been placed in defendant's stable. *Held*, that the plaintiff could not maintain an action for goods sold and delivered.—*Elphick v. Barnes*. English High Court, C. P. Div., 49 L. J. C. P. 699.

TRADE NAME—ADVERTISEMENT—DECEPTION—EVIDENCE.—A tradesman may use a name, though he knows that a neighboring tradesman intends to use it. The defendant, a bootmaker, wrote up over his shop in Bedford street, having its front and entrance in the Strand, the words "Civil Service Boot Supply." The Civil Service Supply Association was, at that time, building a store on Bedford street, which they opened as a general shop, and they also opened a boot shop in Tavistock street, close by. A customer of the association had gone to the defendant's shop, mistaking it for that of the association. *Held*, that there was no proof of the defendant's intention to deceive, and that the association were not entitled to restrain him from using the words "Civil Service Boot Supply."—*Civil Service Supply Association v. Dean*. English High Court, Chy. Div., L. R. 1 Ch. Div. 512.

CATCHING BARGAINS—EXPECTANT HEIRS—UNFAIR ADVANTAGE—EXTENT OF RULE.—The rule against catching bargains is not restricted to the case of expectant heirs, but extends to all cases in which unconscientious and unfair advantage has been taken. Where, therefore, a money lender induced a younger son of a nobleman of high rank and great estate, while still under age, to borrow money of him on extravagantly usurious conditions, and to continue to do so after he had attained his majority, and the money lender made no inquiry into the position of the borrower, but relied for repayment, not on any definite expectations of the latter, but on the probability that, if he should be unable to pay, his father or friends would pay to avert bankruptcy and exposure, or that he would himself pay if he should by any means come into any of the family property, and unconscientiously received and afterwards insisted upon the continuance of payments originally made to him by the borrower under a mistake, and without any obligation to do so: *Held*, that the money lender was only entitled to obtain repayment of the sums actually advanced, with interest at five per cent. from the dates of the several advances. *Nevill v. Snelling*, English High Court, Chy. Div., 43 L. T. (N. S.) 244.

VENDOR AND PURCHASER—CONVEYANCE OF LAND FOR INTENDED BUILDING—COVENANT BY VENDOR TO INCLOSE PURCHASED LAND WITH WALL OR RAILING—ACTION FOR BREACH—MEASURE OF DAM-

AGES—PRINCIPLE ON WHICH DAMAGES ASSESSED.—

In February, 1872, the defendant corporation purchased of W a piece of land, parcel of his freehold estate at C, for the purpose of building thereon a blind school or asylum; and it was conveyed to them, their successors and assigns, in fee by a deed containing a proviso that "if the said corporation should not use or require the land for the purpose of building a school or asylum for the blind, and should at any time within ten years from the 11th of August, 1872, desire to sell the same or such part of it as they should not use or require as aforesaid, then W, his heirs or assigns, should have a right of pre-emption at the price therein specified, for the whole or at the rate per acre therein specified, if for only a part of said land; and that the corporation and their successors would not take proceedings for sale until after the expiration of six months' previous notice to W, his heirs or assigns, of their desire to sell, during which period of six months, W, his heirs or assigns, might elect to exercise the right of pre-emption by giving notice to that effect to the corporation or their successors. By the same deed the defendants also covenanted for themselves, their successors and assigns, with W, his heirs and assigns, that the said piece of land "should be kept inclosed by the corporation, their successors and assigns, on all the sides abutting on the land belonging to W with a brick wall or iron railing seven feet high at the least; and that the side, fronts, and faces of all erections and buildings towards the land belonging to W should be of a good architectural character, and consistent in design and appearance with the exterior of the principal building to be erected on the said land thereby conveyed." W died in September, 1878, and no wall or railing having been erected by the defendant in his lifetime, the plaintiffs, as his executors and trustees, required them to erect the same, which they failed to do, but gave notice to the plaintiffs that they did not require the land for building a school or asylum thereon. Thereupon the plaintiffs gave notice to the defendants to inclose the land within a reasonable time with a wall or railing in accordance with their covenant; and upon the defendants neglecting so to do, the plaintiffs brought an action against them for damages sustained by W's estate, and by the plaintiffs as his representatives, through the defendants' breach of covenant; and on a special case for the opinion of the court, it was *Held*, by the Exchequer Division (Kelly, C. B., and Huddleston, B.), that the covenant by the defendants to inclose the piece of land in question "with a brick wall or iron railing seven feet high at the least," was an absolute covenant, and was not conditional upon the building by the defendants of a school or asylum upon the land; and that the damages to the plaintiffs in consequence of the non-erection of the said wall or railing should, in point of principle, be the amount which it would cost to erect the same in conformity with the covenant, and that they should be assessed upon that basis. *Held*, also, by Kelly, C. B., that, the defendants having failed to perform their covenant, an action for breach of it lay against them by the plaintiffs who, as executors and trustees, or otherwise as representatives of W's real estate, were entitled to receive the damages as covenantees, or executors of the covenantee, in an action for breach of a covenant in a deed *inter partes*. By Huddleston, B.: "In construing covenants, the fulfillment of the evident intention and meaning of the parties to them must be looked at, not confining oneself within the narrow limits of a literal interpretation, but taking a more liberal and extended view, and contemplating at once the whole scope and object of the deed in which they are contained. English High Court, Ex. Div. — *Wigzell v. Corporation*, 43 L. T., N. S. 218.

NOTES OF RECENT DECISIONS.**DISBARMENT OF ATTORNEY — WHAT WILL AUTHORIZE—EVIDENCE—APPEAL FROM DISCRETIONARY ORDER.—1.**

The orders not reviewable in the Court of Appeals on the ground that they are discretionary, are those addressed to the favor of the court and to which the applicant has no absolute right, which may or may not be granted without wrong on either hand. 2. There is a distinction between proceedings for contempt occurring in the presence of the judge and the facts constituting which are certified by him, and cases of professional misconduct out of the presence of the court. In the former it is held that the facts embodied in the order of the judge must be taken as true; in the latter the right of review is asserted not only where there has been a want of jurisdiction, but also where the court below had decided erroneously on the testimony. 3. In proceedings to disbar an attorney where the charges are denied, the common-law rules of evidence apply. The accused is not to be tried upon affidavits, but is entitled to confront the witnesses and subject them to cross-examination and to invoke the well-settled rules of evidence. 4. An attorney in proceedings for the probate of a will, who had taken out a commission for the examination of a witness, prepared answers for such witness to the interrogatories and cross-interrogatories, furnished them to the witness who had received various sums of money from him, read a part of the answers to the commissioner and left the rest for the witness to repeat, and thus got the answers before the surrogate as honest testimony. *Held*, sufficient to authorize an order disbarring the attorney, even though the answers were not shown to be false, and it appeared that the attorney believed them to be true. Affirmed. New York Court of Appeals. Opinion by FINCH, J.—*Re Eldridge*. 22 Alb. L. J. 350.

CONSPIRACY—EVIDENCE—CUSTOM.—Action for the value of goods obtained by defendants who were charged with fraudulent combination amounting to a conspiracy, for the purpose of obtaining them. R had acted as broker for plaintiffs. Testimony was given that it was a custom in the tobacco business, of universal extent, to disregard the statement of brokers in reference to the standing and credit of purchasers, and for the sellers to make their own inquiries as to the purchaser's credit. On appeal: *Held*, that proof of such a custom was not objectionable where there is nothing in the agreement to exclude its application, parties being presumed to contract with reference to a usage or custom which prevails in the particular trade or business to which the contract relates; 1 *Ersk.* 425; 6 N. Y. 72; that plaintiff having moved to strike the evidence out as immaterial, it could not have prejudiced the plaintiff. New York Supreme Court. Opinion by BRADY, J.—*Fuller v. Robinson*.

FRAUD IN OBTAINING DIVORCE—REMEDY IN ONE MARRYING DIVORCED PARTY.—Appeal from an order denying plaintiff's motion for judgment that the marriage between him and defendant be dissolved and declared null and void. *Held*, that though a decree of divorce is obtained by fraud and collusion, a person marrying one of the divorced parties can not avail himself of such fraud to obtain a judgment of nullity. 45 N. Y. 535; *Bish.* on Mar. and Div. § 706. New York Supreme Court. Opinion by BARRETT, J.—*Ruger v. Heckel*.

ARBITRATION—REFUSAL OF ARBITRATORS TO HEAR TESTIMONY—MISCONDUCT VITIATING AWARD—JUDGMENT OF ARBITRATORS AS TO THEIR POWERS REVIEWABLE—CONSTRUCTION OF SUBMISSION.—1.

In an arbitration between plaintiff and defendant, plaintiff offered to produce certain witnesses named, in order to reconcile contradictory statements made by plaintiff and defendant, but was met by a refusal on the part of the arbitrators to receive any testimony except the statements of the parties, they construing the submission to limit their power to the act of passing upon the statements of the parties. Plaintiff did not offer to show what the witnesses offered would testify to. *Held*, that if the arbitrators were erroneous in the construction of the submission, their refusal to receive the testimony offered was such misconduct as would vitiate their award, and that plaintiff had not forfeited his rights by a failure to show what the proposed witnesses would testify to. The refusal of an arbitrator to examine witnesses is sufficient misconduct on his part to induce the court to set aside his award, though he may think he has sufficient evidence without them. *Phipps v. Ingram*, 3 Dowling, 669. In *Van Cortlandt v. Underhill*, 17 Johns. 405, it was held that if the arbitrators refused to hear evidence pertinent and material, it will vitiate the award. In *Fredicar v. Guardian Ins. Co.*, 62 N. Y. 392, it is said that if an arbitrator refuses to hear competent evidence on the merits, his award will be set aside. 2. The decision of arbitrators as to their powers was not conclusive. No such question was submitted to them. It is for the court to judge whether the arbitrators have exceeded their powers or refused to exercise them. The general rule that their decisions are not reviewable on the mere ground that they are erroneous, is applicable only to their decisions on matters submitted to them. The submission is the foundation of their jurisdiction, and they are not the exclusive judges of their own powers. 3. A submission contained this: "The arbitration shall be conducted and decided upon the principle of fair and honorable dealing between man and man." *Held*, not to justify the arbitrators in refusing to hear testimony other than the statements of the parties. Judgment reversed. New York Court of Appeals. Opinion by RAPALLO, J.—*Halstead v. Seaman*.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

September, 1890.

REVIVAL OF DEBT AGAINST ADMINISTRATOR—INDORSEMENTS OF PAYMENT.—A testator, some time previous to his death, held three mortgages on a certain parcel of real estate, and there was a fourth mortgage upon the same, in which C held one-third interest, and P the other two-thirds. C assigned his one-third to P, who agreed to account to C for one-third of the profits arising out of the sale of the estate. P then foreclosed the mortgage and became owner of the equity of redemption. Neither P nor C were liable for the payment of the notes secured by the three prior mortgages held by the testator. On a settlement of accounts between C and the testator, arising out of other transactions, C allowed the testator to charge him with one-third of the interest due on the three mortgage notes, thereby reducing his indebtedness to C, so that at the time of the testator's death he was indebted to C in the sum of \$2,050. After the testator's death, C charged this sum in his books to the estate of P, and so informed the executrix, who was the wife and residuary legatee of the testator; and at the same time told her that he would allow as a set-off against this sum one-third of the interest

falling due on the three mortgage notes, so long as P continued to pay his two-thirds of the same. This arrangement was carried out, and the interest was so indorsed on the notes for about three years, at the end of which time there was a considerable balance then due C from the estate. At the time this proposal was made, in pursuance of which the interest was afterwards indorsed on the notes, the notes were held by the testator's wife as executrix; and thereafter she rendered her final account, by which it appeared that the balance was paid to her as residuary legatee under the will; and in this balance were included the three mortgage notes; and after she thus held the notes, interest was indorsed as aforesaid for nearly three years. The executrix gave bond as such in common form, and no bond as residuary legatee to pay debts and legacies. The executrix never admitted that the claim of C against the estate was a valid one, or agreed orally or in writing to assume it, except by allowing one-third of the interest on the notes to be indorsed as aforesaid. The Gen. Stats., ch. 105, sec. 1, provide that no action shall be brought * * * against an executor, etc., upon a special promise to answer damages out of his own estate, unless the promise, etc., is in writing, signed by the party to be charged, etc. *Held*, that the fact that the testatrix, after she received the mortgages and notes, allowed the interest to be indorsed on the notes, could not be taken as a promise in law by her to assume the debt due from the estate. It would be inequitable thus indirectly to place this burden upon her while C had assumed no legal obligation to pay his proportion of the mortgages and interest, and had only undertaken to pay one-third the interest thereon, while P continued to pay the other two-thirds. Under Gen. Stats., ch. 105, sec. 1, there must be a decree for the testatrix. Opinion by ENDICOTT, J.—*Clarke v. Palmer*.

ADJOINING ESTATES—RESTRICTIONS IN DEEDS—BREACH—EQUITY.—The City of Boston, being the owner of thirteen lots on Rutland Street, made agreements of sale for the same with one B, in all of which agreements, and in the deeds to B of said lots, were inserted the same conditions and restrictions, the second of which provided that "the front line of the building which may be erected on the said lot shall be placed on a line parallel with and fifteen feet back from the said Rutland street;" the fourth, that "no dwelling-house or other building, except the necessary outbuildings, shall be erected or placed on the rear of said lot." The complainant and defendant became severally the owners of adjoining lots, by several *meane* conveyances, all made subject to said conditions and restrictions. The front wall of defendant's house left the ground on a line precisely fifteen feet from said street; but from a point about four feet above the ground, he constructed an addition to his house, about eight or nine feet wide in a line parallel with said street, and projecting three feet and three inches toward said street, extending to the cornice at the top of the house. *Held*, that the complainant was entitled to maintain a bill in equity for the removal of the addition built out from the house by the defendant. *Whiting v. Union Railway Co.*, 11 Gray, 359; *Parker v. Nightingale*, 6 Allen, 341; *Linzee v. Mixer*, 101 Mass. 512; *Western v. Macdermot*, L. R. 2 Ch. Ap. 72. Opinion by SOULE, J.—*Sanborn v. Rice*.

TAXES—ASSESSMENT—RE-ASSESSMENT—EQUITY—CLOUD ON TITLE.—The General Statutes, Ch. 11, § 8, provide that taxes on real estate shall be assessed in the city or town where the real estate lies, to the person who is either the owner or in possession thereof on the first day of May, and that a mortgagee in possession shall be deemed the owner; and § 53

provides that taxes, invalid by any error or irregularity in the assessment, may be re-assessed by the assessors for the time being, to the just amount to which, and upon the estate or to the person to whom, such tax ought at first to have been assessed. On the first day of May, 1876, the first mortgagees were in possession of a mortgaged estate, owned by T and others, by virtue of a conveyance from W, dated August 17, 1875, and recorded December 15, 1875. May 1, 1876, the assessors of the City of Boston assessed a tax upon said estate to W. On July 11, 1877, the assessor of said city, by a re-assessment, assessed to said T and others upon said estate a smaller tax for the year 1876, at a lower valuation; and August 29, 1878, the collector sold said estate, by deed duly recorded, to said city for the non-payment of said last-named tax. The plaintiff, owner and holder of said estate by virtue of the foreclosure of a second mortgage thereon, brought a bill in equity praying that the cloud upon his title, resulting from the foregoing proceedings, might be removed. *Held*, that the first mortgagees were the only persons to whom said first tax could be assessed; that a re-assessment was within the authority of the assessors for the year 1877, if made in the just amount and to the person to whom said tax ought at first to have been assessed; that the re-assessment was invalid, because made to said T and others, the owners on May 1, 1876, of the equity of redemption, instead of to said first mortgagees in possession; that said collector's deed was void, and constituted a cloud on plaintiff's title; and that the bill might be maintained to remove said cloud. Opinion by SOULE, J.—*Davis v. Boston*.

SALE OF STOCK—EQUITY—PARTNERSHIP.—The plaintiff bought of F and H, July 10, 1878, 100 shares of the C. S. & C. R. R. Co., and paid them \$487.50 for the same, and a power of attorney for the transfer of said shares was duly executed to the plaintiff. July 6, 8 and 9, F and H sold in like manner to other parties 1,400 shares of this stock, and certificates for them were issued to the purchasers by the company between July 12 and August 13 following. July 11, there were 900 shares standing in the name of F and H on the books of said company, and other shares were afterwards transferred to them or to F as trustee; and the plaintiff could have obtained a certificate from the company for his 100 shares at any time between July 11 and August 13; but he made no application for a certificate until February, 1879, at which time no shares were standing in the name of F and H. Soon after July 10, F and H dissolved partnership, a settlement was had, and F subsequently left the Commonwealth, being a defaulter; but H had no knowledge of the sale of shares to plaintiff until the filing of plaintiff's bill in equity, though the money was paid to F by the plaintiff before the dissolution of the firm; nor did H know that the stock account had been overdrawn, but he settled with F upon such information as he had. It did not appear that any of this stock came into H's hands upon this settlement, or that the firm or either of its members had any interest in the stock after August 13. The bill was originally brought against F, H and the Railroad Company, and prayed for a specific performance of the contract. By amendment, the persons to whom F and H had sold stock on July 6, 8 and 9, and the assignee in bankruptcy of F were made parties. Fraud was not found by the presiding judge, and a decree was entered dismissing the bill against all the defendants except H, and ordering him to pay the plaintiff the amount of \$487.50 with interest and costs, from which decree both parties appealed: *Held*, that the plaintiff having voluntarily neglected to demand his stock, it

would not be equitable to give him the benefit that would accrue from its rise in value; that he obtained all he was entitled to by the decree imposing upon H the duty of paying the amount received by his firm for the stock; that, although the firm, by giving a power of attorney to transfer the stock, did all that was necessary to enable the plaintiff to obtain it, if he had used due diligence, yet, by reason of their subsequent acts, the plaintiff failed to get it, and equity requires that H should pay back the money received by the firm before its dissolution; that the bill should not be dismissed because the plaintiff might recover this sum in an action at law; and that the evidence of sales and transfers of the stock to other parties, who were parties to the bill, was competent as showing why the plaintiff did not obtain his stock, and as bearing on the question whether the transactions were fraudulent as against the plaintiff. Decree affirmed. Opinion by ENDICOTT, J.—*Wouson v. Fenno*.

SUPREME COURT OF MICHIGAN.

October, 1880.

CRIMINAL CONVERSATION—EVIDENCE OF HUSBAND AND WIFE AS TO NON-INTERCOURSE.—1. An action lies by a husband for criminal conversation, even where the wife has not consented to the unlawful connection. 2. In an action for criminal conversation, the testimony of the husband and wife was admitted by the court, to the effect that they had had no intercourse at the time the child was begotten, and that the defendant "must have been its father:" *Heid*, error. According to an ancient rule of the common law the evidence of neither husband nor wife could be received to disprove the fact of sexual intercourse (1 Wils. 340); and Lord Mansfield declared that it was "founded in decency, morality, and policy" (Cowp. 591); and no judge or author has ever dissented from his strong approval. Greenleaf says that when the husband and wife cohabit together as such, and no impotency is proved, the issue is conclusively presumed to be legitimate, though the wife is proved to have been at the same time guilty of infidelity. 1 Ev. § 28. The warrant of authority is in favor of qualifying this statement, and, instead of regarding the presumption as conclusive, to require it to apply with great force, but subject to be overcome by admissible facts and circumstances of such cogency as to render belief necessary. 5 Cl. & Finn, 163; Wharton's Ev. §§ 1298, 1299, 1300; Best, Ev. (Wood's Ed.) 426, 464, 465. To overcome the presumption and disprove intercourse, there must be cogent facts and circumstances. 1 Sim. & S. 150; 6 How. 550. In *Stigall v. Stigall*, Chief Justice Marshall held that whilst it was not necessary to make out that connection was not possible, it was proper that the evidence should establish its non-occurrence beyond all reasonable doubt. 2 Brock. 255. And the Supreme Court of Massachusetts applied the same rule in *Sullivan v. Kelley*, 3 Allen, 148. See, also, 2 Allen, 453; 3 Paige, 139. Here, as already noticed, there was neither proof of inability nor of the certain want of opportunity, or even the faintest approach to a denial of the fact, and the child was born only eight months after the alleged violence. The circumstances permitted the assignment of the paternity of the child to the plaintiff without any infringement of the statements sworn to, and the court should have told the jury that there was no legal evidence that the plaintiff was not father of the child, and that it was

their duty to consider that he was. Reversed. Opinion by GRAVES, J.—*Egbert v. Greenwalt*.

MORTGAGE CONTAINING POWER TO APPOINT RECEIVER ON DEFAULT WITHOUT NOTICE—EX PARTE APPOINTMENT BY COURT VOID.—A mortgage secured to the mortgagee a right to the rents and profits after default, and the right to have a receiver appointed without notice. Under this power the court, on bill filed, made an *ex parte* order appointing a receiver. Held, that the court had no power to grant such an order, which was unprecedented even under the old practice, both for requiring no security, and for having no basis of facts to authorize it. The courts in equity have no power to appoint receivers except when such appointment is allowed by law. 17 Comp. Laws, § 5070. There is no statute which authorizes the court to carry out *ex parte* any private agreement of parties outside of the usual course, or which would render its action valid in any case, if it deprived a person of property or its control without such a hearing as is required to determine the right. Under the old practice existing at a time when the possessory right was deemed covered by a mortgage, a court of equity would not interfere to grant a receiver unless two conditions coincided: first, that the premises were scanty security; and second, that the mortgagor was insolvent. Walk. Ch. 43. Even this was regarded as contrary to public policy by our legislature, and in 1843 the old law was changed so as to secure the mortgagor in his possession until a foreclosure had become absolute. The effect of this, as we have several times decided, was to prevent the mortgagee from obtaining under his mortgage any interest beyond that of a security, to be enforced only by sale on foreclosure, and to debar him from any right of possession. 17 Mich. 263; 5 Mich. 456; 12 Mich. 270; 13 Mich. 23; 13 Mich. 380; 15 Mich. 380; 15 Mich. 391; 29 Mich. 44; 30 Mich. 380; 36 Mich. 364. The statute does not say that no ejectment shall lie unless there is an agreement to that effect, but that it shall not lie at all. Every mortgage made in common-law form contains words whereby, if applied as they read, possession would belong to the mortgagee, and his title would become absolute by default. The whole aim of equity was to arrest this forfeiture, and not to allow the language of a mortgage to have any force against the equity of redemption. The statute is a further step in the same direction for the protection of mortgagors against agreements which, as literally drawn and as heretofore expounded, were deemed dangerous, and against public policy. The language of this mortgage expressly granting rents and profits on default is no stronger than the previous words of grant, and is really narrowed. It was no doubt intended to go further and to evade the statute. If it had contained an agreement that ejectment should lie, it could not very well be enforced against the clause of the statute prohibiting it. It can have no greater force in enlarging the jurisdiction of equity to appoint receivers, which we held in 36 Mich. 364, had been abolished. Any such attempt to create a forfeiture is contrary to equity, and equity will not enforce it. The same principle which makes all original agreements void, which destroy the equity of redemption in advance, must cover a partial as well as complete destruction. Reversed. Opinion by CAMPBELL, J.—*Hazeltine v. Granger*.

DEVISEE MAY BRING EJECTMENT BEFORE PROBATE.—A devisee may bring an action of ejectment before probate of the will under which he claims. The technical rules of common-law pleading required an executor to make *proferat* of his letters in pleading. But for any other purpose the decisions are uniform,

that probate merely furnished the means of establishing by a peculiar kind of record-evidence the validity of an existing right; and that for every valuable purpose touching the existence and transfer of title the probate was retroactive, and had the same effect as if it had been had at the time of the testator's death. And so far as the statutes have been applied to devisees, there is no material difference. Reversed. Opinion by CAMPBELL, J.—*Richards v. Pierce*.

SALE AT AGREED PRICE—RETURN OF GOODS—TRESPASS.—F having some beef for sale, B promised to take some at the market price at the time of delivery. F soon after delivered a quarter of beef at B's house in the latter's absence, and B ate some of it for his supper. But next day F charged him six cents a pound for the beef, and having discovered that the highest market price was only four cents, he notified F to take it away. F took away what was left, and sold it, abating a small amount from the price, because it had been cut. In an action of trespass the court below refused certain requests to charge, based on the theory that trespass would not lie for an injury to property out of plaintiff's possession, and told the jury that it was for them to determine whether there had been a sale on credit which would pass the title to the beef, or whether there had been any sale whatever; in response to a request from defendant's counsel to charge the jury as to who must have done the act complained of, it said: "I think the defendant must have committed the act, or advised it to be done; and I think further that if he, knowing that this beef had been cut off, and it was served up to him, and he proceeded to masticate a portion of it, I think that is trespass itself, provided, of course, the ownership was as heretofore stated." Judgment was rendered for plaintiff for the amount of damages assessed with costs of suit. MARSTON, C. J. "We can conceive of no plausible reason, either within or beyond the realms of law, upon which the judgment in this case can be sustained. It would be equally difficult to add to the absurdity of the plaintiff's claim anything in the shape of serious argument. The judgment must be reversed with costs of both courts."—*Finch v. Brian*.

SUPREME COURT OF PENNSYLVANIA.

October, 1880.

WILL OF FEMALE REVOKED BY MARRIAGE—PAROL ANTE-NUPTIAL CONTRACT—MISTAKE—POWER OF EQUITY.—1. The will of a single woman is revoked by her subsequent marriage; but when a single woman, in contemplation of marriage, wishes to make a disposition of her estate that would be valid and effectual after marriage, and in ignorance of this statutory enactment, puts it in the form of a will, a court of equity will reform the instrument, so as to give full effect to the intentions of the party. 2. A parol ante-nuptial contract, being in consideration of marriage, is valid and binding upon the parties to it; hence a man who agrees by parol with the woman to whom he is about to be married, that "she may dispose of her fortune by will or otherwise, any way she pleased," can not avoid the contract because it is not in writing. 3. A paper which, though ineffectual as a will, may, under the equitable doctrine that whatever a chancellor on the facts of a case would have decreed to be done, the courts will consider as having actually been done, have full force and effect given to it as an instrument in the nature of a last will and testament. 4. Where a person has a full legal right to dispose of

property, but mistakes the form of the instrument, a court of equity will correct the mistake so as to carry out the intentions of the party. Reversed. Opinion by SHARSWOOD, C. J.—*Laut's Appeal*. 11 Pitts. L. J. 86.

STATUTE OF FRAUDS—PAROL CONTRACT CONCERNING LAND MAY BE SUBJECT OF ACTION, ALTHOUGH IT CAN NOT BE ENFORCED BY SPECIFIC PERFORMANCE—GUARANTY—ASSIGNMENT.—1. An action for breach of a parol contract concerning lands may be maintained, although specific performance of the contract could not be enforced. 2. A purchased from the assignee for the benefit of creditors of B, a tract of land which B guaranteed by parol contained a certain number of acres. A paid the full purchase money, and received his deed, which, however, conveyed a less number of acres, as shown by a new survey. A then sued B *in assumpsit* upon his parol contract of guaranty: *Held* (reversing the judgment of non-suit in the court below), that A could recover. The statute of frauds has no application to such a case. 3. Although B had made an assignment of the land for the benefit of creditors, sufficient interest remained in him to support the collateral guaranty, in other words, he was not a mere volunteer. Reversed. Opinion by GORDON, J.—*Schriever v. Eckenrode*.

OPENING JUDGMENT ENTERED BY WARRANT OF ATTORNEY—JUDGMENT NOTE GIVEN FOR COMPOUNDING FELONY—RIGHT OF DEFENDANT TO HAVE JUDGMENT OPENED.—1. A note whose consideration is the stifling of a prosecution for forgery is void, and the entry of judgment thereon, by virtue of a warrant of attorney, does not make it an executed contract within the maxim: "*In pari delicto potior est conditio possidentis*," and "*Nemo allegans suam turpitudinem audiendus est*." In such case public policy requires that the defendant be heard, and if the contract be void, his relief is an incident. The principle depends on the public good, not on the merit of the defendant whose hand is as foul as the plaintiff's. But in a case of mere fraud between the parties, where the public is not interested, the maxim, "*In pari delicto*," etc., has its full force, and the law leaves the parties as they placed themselves. 2. While a judgment entered on warrant of attorney has the same effect as if on the verdict of a jury, while it stands, such a judgment is not necessarily a waiver of the results of adjudications; and where a defense is set up on the ground of public policy, the court should open the confessed judgment and let the defendant into a defense. The argument that the defendant, as actor, will not be heard alleging his own and the plaintiff's turpitude, will not avail; the plaintiff is, in one sense, the actor; he caused confession of judgment on the void instrument, and seeks the process of the law, by execution, to collect the money agreed to be paid for its violation. Reversed. Opinion by TRUNKEY, J. STERRETT, J., dissents.—*Bredin v. Dorsey*.

HUSBAND AND WIFE—CONTRACT BY WIFE BEFORE MARRIAGE.—A woman hired a dwelling-house and took possession, agreeing to pay a specified rent. Thereafter she married, continued to occupy the house, her husband not living with her but visiting her frequently, and occasionally remaining with her over night. *Held*, that the husband was not liable for the rent of the house accruing after the marriage. The duty of a man to support and maintain his wife is well settled, and may be enforced by legal process in case of his refusal or neglect to do so. But he was a stranger to this contract. The lessee was in possession of the premises under a lease when he married

her. The contract and liability were hers. He no more assumed the payment of her liability under the lease than he did of her other debts, if any existed. It is true she lived in and enjoyed the use of the house for some months after her marriage. In like manner her clothing purchased before was worn and used after marriage—if unpaid for, the husband could not be held responsible for it. Opinion by PAXSON, J.—*Biery v. Ziegler*.

CONSIDERATION—MORAL OBLIGATION OF MARRIED WOMAN.—The debt of a married woman, which she is not bound to pay, will prove a sufficient consideration to support an obligation under seal, by a third person, to pay it. It is true, as a general rule, the contract of a married woman is void, so that no action will lie against her for its breach. To this, however, there are some exceptions. Although no recovery may be had against her, it by no means follows that the equity of the claim may not be sufficient consideration to support the promise of the wife herself, made after her coverture had ceased, and she had become *sui juris*. 25 P. F. Smith, 420; 2 Norris, 144. The tendency of the authorities is to treat the disabilities of a married woman as a personal privilege, which does not extend to any person who unites with her in a contract. Thus, if she execute a note jointly with her husband, she may not be bound, yet he shall be bound for the whole. 3 Norris, 135. Opinion by MERCUR, J.—*Leonard v. Duffin*.

SUPREME COURT OF MISSOURI.

November, 1880.

CRIMINAL LAW—INDICTMENT IN COUNTY OTHER THAN WHERE OFFENSE WAS COMMITTED—CONSTITUTIONALITY OF STATUTE.—Defendant was indicted in Scotland County for a murder alleged to have been committed in Clarke County. The indictment was thus found under R. S. § 1804, which reads as follows: "Whenever a felony has been committed in any county, and the grand jury of the county has considered the matter, and failed to find an indictment against the offender, and the same is certified to the judge of the same circuit from the foreman of the grand jury or the clerk of the circuit court of such county, and the judge of such circuit is satisfied that an impartial grand jury can not be had in the county where the offense was committed, he shall order the examination of the offense to be had in some county adjacent to the said county, where he believes no such cause exists, but no investigation can be ordered by him, except in one county; and where an indictment is found in such county, a trial before a petit jury shall be had in the county where found, unless removed on application of the defendant." Section 12, article 2. of the Constitution of 1875 provides "that no person shall for a felony be proceeded against criminally otherwise than by indictment, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger." Section 22 of the same article provides that: "In criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy, public trial by an impartial jury of the county." Defendant was in custody under the above named indictment, and sought a discharge under the *habeas corpus* act, on the ground

that § 1804 is unconstitutional. *Held*, that the above constitutional provisions secure to the citizen charged with a felony, first, the right to have the charge preferred by indictment before he can be tried, and, second, the right after indictment to a speedy public trial by an impartial jury of the county. The word "indictment," as used in sec. 12, *supra*, has a well-defined meaning, and must be accepted and understood as having been inserted in the Constitution with the meaning attached to it at common law. It is thus defined: "An indictment is an accusation at the suit of the King (or State) by the oaths of twelve men (at the least, and not more than twenty-three), of the same county wherein the offense was committed, returned to inquire of all offenses in general in the county, determinable by the court in which they are returned, and finding a bill brought before them to be true." 5 Bac. Abr. p. 48. The common-law definition has been modified in this State by sec. 28, art. 2, of the Constitution, which declares that hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment. The above definition of the term "indictment" is fully warranted by the following authorities: 5 Bac. Abr. pp. 52, 61; 2 Hawk. P. C., § 34, p. 313; 1 Bish. Cr. Pro., § 65. The section of the statute in question was first adopted in 1865, when it was authorized by the following provision of the Constitution of 1865: "The general assembly shall provide by law for the indictment and trial of persons charged with the commission of any felony, in any county other than that in which the offense was committed, whenever, owing to prejudice or any other cause, an impartial grand or petit jury cannot be empanelled in the county in which said offense is committed." The Constitution of 1820 contained no such provision as the above, and the incorporation of it in the Constitution of 1865 is persuasive, if not conclusive evidence, that the framers of that instrument believed that the general assembly, unless such power was expressly conferred upon them, could not exercise it. The clause of the Constitution of 1865, which gave sanction to the statute, was not inserted in the Constitution of 1875; and being thus abolished, it necessarily abolishes and destroys the statute, which rested solely upon it for support. It is utterly null and void, because it undertakes to deprive persons of the constitutional right conferred by § 12, *supra*, which gives to every person charged with a felony, before he can be tried, the right to have that charge preferred in an indictment found by a grand jury of the county where the offense was committed. This right the statute takes away as to some persons. Authorities cited, sustaining statutes authorizing indictments in different counties, where goods have been stolen in one county and carried into another, and authorizing defendants to take changes of venue in criminal cases, are obviously not in point here. Prisoner discharged. Opinion by NORTON J.—*Ex parte Stater, alias Lane*.

MALICIOUS PROSECUTION — PROBABLE CAUSE — ABUSE OF CRIMINAL PROCESS — EFFECT OF REVERSAL OF JUDGMENT—EXCESSIVE VERDICT.—The facts in this case are voluminous, and the instructions numerous. A concise statement of the main facts of the case, as well as the issues made, will be found in *Sharpe v. Johnston*, 59 Mo. 557, being the same case on a former appeal. The judgment was then reversed, because of errors in the tenth and eleventh instructions given for the plaintiff, which treated the plaintiff as a partner in the assets charged to have been embezzled, after a final accounting and settlement by the partners. Upon a retrial in the circuit court, the objectionable instructions were modified to meet the views of the Supreme Court,

and the plaintiff had a verdict and judgment for \$7,000, being several hundred dollars more than the former verdict. From this judgment the defendants appealed to the Court of Appeals, where the judgment of the circuit court was reversed, and the plaintiff appealed to this court. *Held*, in addition to what appears in 59 Mo., *supra*, that a prosecution instituted with any other motive than bringing a guilty party to justice is a malicious prosecution, and the evidence failing to show reasonable or probable cause, the case is fully made out. A criminal prosecution, instituted for the sole purpose of collecting a private claim, is unlawful, an abuse of the process of the law, and cannot be justified, even by advice of counsel. This fact appearing, plaintiff need not proceed further and show want of probable cause. *Krug v. Ward*, 77 Ill. 603; *Galway v. Burr*, 32 Mich. 335; *Seiber v. Price*, 26 Mich. 522; *Page v. Cushing*, 38 Me. 523; *Prough v. Enteriken*, 11 Pa. St. 81. The evidence in this case tended to show that had plaintiff settled the claims held against him by defendants, the criminal prosecution complained of would have been dropped, and the jury found their verdict evidently on this theory, which was justified by the law as above stated. 2. When the judgment is reversed and the cause remanded in this court, the trial in the lower court must be *de novo*. 3. Two juries having passed upon the facts of this case, and found verdicts nearly the same in amount, the court can not say that the verdict is excessive. Judgment of Court of Appeals reversed, and of circuit court affirmed. Opinion by NAPTUN, J.—*Sharpe v. Johnston*.

SUPREME COURT OF INDIANA.

October, 1880.

PROMISSORY NOTE—USURIOUS INTEREST.—Suit upon a note executed Nov. 1, 1873, for \$708.97. Answer by way of recoupment, that the note was given in renewal of one executed in 1855, for \$223.65, at eight per cent, on which the interest had been paid for nearly three years; that the plaintiff so computed and compounded the interest on the former note, as to make the amount, due when the note sued on was given, appear to be the amount specified therein; and that such note was given in part for usurious interest. A demurrer for want of sufficient facts was sustained to this answer. *Held*, the answer was good. Under the statute in force at the time the note in suit was executed, ten per cent. per annum was the highest rate of interest that could be contracted for, and the interest on the former note could not be so compounded as to make it exceed that rate. 68 Ind. 181. Reversed. Opinion by WORDEN, J.—*Kimbrough v. Lukins*.

CRIMINAL LAW—CORRECTION OF RECORD—PARTIAL INSTRUCTION—DEFENDANT'S CHARACTER.—1. Courts have full control of the records of their proceedings during the entire term at which such proceedings are had; and where, in a criminal case, the record, as made up at the time of trial, failed to show any arraignment or plea to the indictment, a *nunc pro tunc* entry of such fact was properly made at an adjourned session of the same term of the court, as of the date of trial. When the record does not disclose upon what ground the court acted, in correcting, modifying or vacating a judgment, the Supreme Court will presume that the action of the court was based upon some good and sufficient reason. 43 Ind. 411. These rules are applicable in civil and criminal cases alike, except that they can not be construed to mean

that any important step can be taken at the trial in a criminal case in the defendant's absence, unless when otherwise expressly provided by law. 2. Where an instruction states the law correctly as far as it goes, and no erroneous inference can reasonably be drawn from what is omitted by it, it will not be held erroneous because it fails to give the whole law upon the subject to which it relates. 3. In a criminal case the defendant's character is not considered, unless the defendant first introduces evidence in support of it. In that event the question of character must be decided upon the evidence, as other questions. Affirmed. Opinion by NIBLACK, J.—*Knight v. State*.

SALE OF MORTGAGED GOODS ON EXECUTION—RIGHT TO POSSESSION.—Action by appellant to recover possession of certain personal property, claiming the same by virtue of a chattel mortgage executed to her by one Hancock in 1876, to secure a note due in five years from that time. The mortgage provided that the mortgagor should retain possession of the property, but that if it should be levied on, the mortgagee should have the right to take immediate and unconditional possession for her own use. The property was levied on by the appellee, a constable, to satisfy an execution against the mortgagor. Held, that under section 436 of the code the officer was authorized to levy on and hold possession of the property, and sell the same subject to the mortgage, possession by the officer being essential to the validity of the sale. Code, sec. 469. Appellant was not entitled to recover. Affirmed. Opinion by HOWK, J.—*Sparks v. Compton*.

ARBITRATION—ENFORCEMENT OF AWARD.—It is a common-law rule that matters in difference between parties competent to contract may generally be submitted to arbitration by parol. Morse on Arb. 50; Russell on Awards, 46. This common-law rule is in force in this State. 8 Ind. 264; 29 Ind. 46. An award may generally be enforced by action upon it; especially an award good only at common law. 32 Ind. 419; 58 Ind. 254. Awards will be valid at common law notwithstanding informalities, and of binding obligation on the parties. Reversed. Opinion by NIBLACK, J.—*Webb v. Zeller*.

PUBLIC OPINION.

THE DRUMMERS' OCCUPATION TAX.—The *Texas Land and Railway Journal* for November says: The attention of merchants, manufacturers and farmers is called to the correspondence and rulings of the comptroller and attorney-general in another column. Whilst these rulings are undoubtedly true expositions of the law as it reads in our statute books, it certainly could not have been the intention of the legislature to impose such restrictions upon our citizens as these rulings indicate. If such was the intention, and if they are to be enforced according to the interpretation of the above named officers, the sooner they are repealed or modified, the better it will be for our people. According to their rulings merchants, manufacturers, or their clerks, can not, outside of their places of business, intimate to a customer a desire to trade with him, or even invite him into the same for that purpose, without making themselves liable to this tax. Nor can a merchant who happens to be overstocked with goods step into his neighbor's store and inform him of the fact, with the view of supplying what the other may need, without becoming so liable. Al-

though this law was framed by a legislature having a majority representing the rural districts, it is unreasonable to suppose that they intended or desired to discriminate against the business of their fellow-citizens of the towns and cities. If such was the intent, they could not have realized the fact that the cost of these burdens would, of necessity, be added to the price of the goods, of which the rural population are the main consumers. It was clearly the object of the legislature in imposing a tax upon drummers, to protect merchants and manufacturers located in this State, who paid their *ad valorem* tax, from competition with non-residents who pay no tax. The wisdom of the law taxing agents from other States, who come here to sell goods, is questionable; for it is a generally admitted fact that it costs our merchants less to purchase their supplies from them, than to visit in person the marts of trade which these drummers represent; and if, by so doing, money is saved by the merchant, it should result in a saving to the consumer; but, be this as it may, it can not be denied that when this law is extended in its operation to embrace our local merchants and manufacturers, and construed according to the comptroller's rulings, it is oppressive to the last degree. Extreme cases sometimes best suit the purpose of illustration. According to this law, as construed by the comptroller and attorney-general (and we think fairly construed), a person who solicits business outside of his premises, is a drummer. A merchant, who on the street, hands his business card to any person, is soliciting business; for that is presumed to be the object of delivering the card, as the card announces the fact that he has goods to sell and is an invitation to call at his store and buy; he is therefore a drummer. A publisher of a newspaper prints in his paper articles soliciting advertising, which is "soliciting business;" as long as the paper remains in his office, he is in the exempt class; but the moment he sends it out to be delivered to the public, he is soliciting business outside of his premises. Why is he not a drummer? Then there is our "tamala" merchant, whose place of business is at a certain point on the curbstone. So long as he sits on his nail keg behind his basket, he is all right; but suppose he steps across the sidewalk to invite a hungry "ward of the nation" to invest a nickel in the steaming morcean, can't he be gobbled for an unlicensed "drummer?" Verily, under the rulings, he is a violator of the law. These may be called extreme cases, but the principle applies nevertheless.

THE USE OF THE LASH.—The *New York Sun* of the 2d inst. remarks: On the 15th ultimo one of the most brazen-faced ruffians who ever stood up in a British court, suddenly wilted and uttered a scream, on hearing the terms of the judge's sentence, and was taken away in a fainting condition. He had no defense. The evidence against him was conclusive. He was sure of conviction and of a severe sentence, and he knew it. But he was not prepared for one part of the punishment prescribed by Mr. Justice Stephen. He screamed and almost fainted, not in view of the twenty years of penal servitude, but because the judge ordered, as a fitting prelude, thirty lashes from a cat-o'-nine-tails. This man had robbed and attempted to murder by drugging, and then throwing from a railway carriage, a traveling companion, in whose confidence he had artfully ingratiated himself. It was a premeditated crime of the most heinous kind. It would have ended in murder but for the inability of the assassin to eject his victim from the car before the train stopped. The ruffian then escaped with his

booty, but was followed by the half-stupefied, badly-injured man, who staggered upon the platform and gave an alarm which led to the capture of his assailant. This strange affair took place in a car (of the London underground line), of which the two men were the only occupants. Mr. Justice Stephen, in passing sentence, said it was "the most cowardly and brutal outrage that had ever been brought under his notice." He marked his sense of horror, as well as made the sentence a wholesome caution to all other minded desperadoes, by prefixing the thirty lashes to the twenty years' imprisonment. The prisoner would not have flinched from the incarceration, but he winced terribly under the judgment of the cat, as if he already felt her nine tails raising wales on his back. It is the uniform experience of British judges that corporal punishment is the most certain known deterrent of cowardly and brutal offenses. When any peculiarly shocking crime against the person begins to become common in England, the judges always check it by ordering a dose of the cat well laid on, in addition to a long term of imprisonment with hard labor. This is the best known preventive for outrages on women and children. It is the only thing that has put a stop to garroting. Its success is so marked in the declining frequency of cruel and malicious assaults upon the person in England, that the British public almost unanimously approve of it. Only a little minority of those philanthropists, whose sympathies for criminals rise in exact proportion to the diabolism of their proteges, continue to protest against the lash as a remedial agent of society. While that agent does so manifestly good a work in England, it will be judiciously conserved there. The theoretical opposition to it in the United States is widespread and intense, as any man finds out to his cost who proposes to reintroduce it in our judicial system. But now and then thinking Americans will brave the consequences and ask themselves and their neighbors if corporal chastisement, so common among our ancestors as a penalty for minor violations of law, might not be revived, with signal advantage to society, for the punishment of certain specially atrocious crimes.

QUERIES AND ANSWERS.

[*The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.]

QUERIES.

50. In all cases of fraud, trust or contract, the jurisdiction of a court of chancery is sustained wherever the person may be found, although the land is not within the jurisdiction of the court, that may be effected by the decree. So held in *Maslie v. Watts*, 6 Cranch, 148. Suppose a case to have been commenced in Iowa against a party charged with having obtained the legal title to land located in Missouri by fraud. Both plaintiff and defendant resided in Iowa, and defendant duly served with process. An action thus commenced, would its effect be the same on *pendente lite* purchasers, as if the suit had been commenced in Missouri, where the land is located.

Toledo, O.

X.

CURRENT TOPICS.

A late case in New Jersey, (*State v. Nugent*, 2 N. J. L. J. 347), will serve as a text for a sermon on woman's wrongs. The defendant was convicted of having "unlawfully and maliciously, with intent to destroy or render useless," broken to pieces a sewing machine bought and paid for by his wife, which was at the time used for family sewing, and also cutting two shawls, bought and paid for by him partly with his own and partly with his wife's earnings, which shawls, since their purchase, had been continuously worn and used by the wife as her apparel. The conviction was founded on the following statute: "If any person shall unlawfully or maliciously—eat, break, burn, destroy or damage, with intent to destroy or render useless, any goods or chattels . . . the property of any other person, he shall be deemed guilty, etc." On motion in arrest of judgment the defendant was discharged, the court holding that he was not liable for damaging the sewing machine because it was his own property, nor for damaging the shawls because, even admitting that they were the property of his wife, she was not an "other person" within the statute. "At common law" said Stewart, J., "the title of all chattels belonging to the wife is vested in her husband; and if it appeared at the trial that the owner of the goods stolen and stated to be such was a married woman, the prisoner was acquitted, (*Hughes v. Com.*, 17 Gratt. 565); and this rule holds now in some States. (*State v. Hays*, 21 Ind. 288); and the husband is presumed to be the owner of all the personal property possessed by the family until the contrary appears. *Topley v. Topley*, 31 Pa. St. 328; *Com. v. Williams*, 7 Gray, 337; *State v. Pitts*, 12 S. C. (N. S.) 180; *Pratt v. State*, 35 Ohio St. 514. So it has been held that personal apparel furnished by a husband to his wife, or purchased by the wife with the consent of her husband with money given her by him from a fund formed by their joint earnings, remains the property of the husband, and the wife can not maintain an action against a carrier for the loss thereof. *Hawkins v. Providence R. Co.*, 119 Mass. 596. Although in an indictment against a third person for stealing the goods of the wife used in the household with her assent, the ownership may be laid either in her or her husband (*Petre v. State*, 6 Vr. 64), yet, viewing a husband and wife under such circumstances as joint owners, a charge of larceny by one joint owner against another will not lie. *State v. Kent*, 22 Minn. 41; *Kirksey v. Fike*, 29 Ala. 206. The Married Woman's Acts do not so far destroy the unity of husband and wife that either can be convicted of larceny of the other's separate goods. *Stevens v. State*, 44 Ind. 469; *Thomas v. Thomas*, 51 Ill. 163; *Overton v. State*, 43 Tex. 616; *Reg. v. Kenny*, 25 W. R. 679, 5 Cent. L. J. 68. Nor can a husband be guilty of arson in burning his wife's house. *Snyder v. People*, 26 Mich. 106. Nor can the wife sue her husband for slander. *Freethy v. Freethy*, 42 Barb. 641; *Tilbs v. Brown*, 2 Grant's Cas. 39. Nor in replevin. *Hobbs v. Hobbs* (Ms.), 22 Alb. L. J. 135. Nor in trover. *Owen v. Owen*, 22 Iowa, 270. Nor in a civil suit for an assault and battery. *Longendyke v. Longendyke*, 44 Barb. 367. Even after a divorce, the assault having been committed during coverture. *Abbott v. Abbott*, 67 Me. 304; *Phillips v. Barnett*, L. R. 1 Q. B. Div. 426, 3 Cent. L. J. 412. These cases as to larceny are all founded on the rule that a person can not steal his own property. *Com. v. Tobin*, 2 Brews. 570; *Taylor v. State*, 7 Tex. App. 659; *People v. MacKinley*, 9 Cal. 250; *People v. Vice*, 21 Cal. 344. There have been cases holding that, un-

der the words "any person" in a statute, the owner might be included if the intent was apparent, *Com. v. Tewksbury*, 11 Metc. 551; *State v. Hurd*, 51 N. H. 176. But they do not extend to the one under consideration. The property damaged in this case, clearly the sewing-machine, and in my opinion, the shawls also, were not the property of any other person within the contemplation of the statute. It must be remembered that this, being inanimate property, can be injured only in the title. *Davis v. Com.*, 30 Pa. St. 421. The defendant should therefore be discharged." The *Chicago Legal News* will, we have no doubt, report this decision without delay and with appropriate comments. Judge Stewart should remember the fate of Judge Harker.

The recent elections have led to some new constructions of the naturalization laws. Two cases on the statute as to minors' petitions, we note in the Philadelphia courts. In *re Merry*, 9 W. N. 169, the petition set forth that the petitioner would attain his majority in October, 1880, and that he had resided in the United States three years prior to the presentation of his petition. The court (Sept. 11) refused the application, saying: "The petitioner's evidence shows that he will not reach his majority until some time next month. The petition is founded upon the act of Congress of May 26th, 1824. That act requires that the petitioner shall be at least twenty-one years of age to entitle him to citizenship; that he shall have resided in the United States at least five years, three of which must be prior to his becoming of age. The petitioner being a minor, he has no status under the act just referred to. In order that I may not be misunderstood, I may add that, under the act of Congress of April 14th, 1802, a minor, of foreign birth, having declared his intention after two years' residence in the United States, and having resided therein three years thereafter, may, upon the petition of his guardian, or perhaps next friend, be admitted to citizenship, though yet a minor. This latter act does not require the petitioner to be of age, but it does require that he should have declared his intentions at least two years previous to his application, and also prove a residence here of five years."

In the other case (*re Randall*, 9 W. N. 139) a more important ruling was announced. The statute requires that an alien who seeks to be naturalized under the section as to minors (R. S. § 2167) shall "declare on oath and prove to the satisfaction of the court that for two years next preceding it has been his *bona fide* intention to become a citizen of the United States," but it dispenses with the declaration of intention required in other cases. The court held that where the applicant was thirty-eight years old, his oath alone was not sufficient proof of the time when he formed the intention to become a citizen. "Ordinarily," said the court, "the declaration of intention is made before the courts or their clerks, and it is therefore known to the courts, or can be shown by their records, precisely when the intention to become a citizen is determined upon. But this means of proof is dispensed with as to minor aliens who shall have resided in the United States three years next preceding their arriving at the age of twenty-one years; and it requires, instead, that the petitioner shall declare on oath and prove, not 'or prove,' to the satisfaction of the court, that for three years next preceding it has been the *bona fide* intention of such alien to be-

come a citizen, etc. 'He shall prove' means he shall furnish the evidence to establish the proof to the court's satisfaction; not by his oath, for that the act requires independently of the proof demanded by the act. In other words, the act requires that both the oath of the petitioner and proof shall be submitted to the court to enable it to determine whether or not the petitioner is entitled to citizenship. *** Having thus ascertained the law, let us examine the proof. There is no evidence whatever, independently of the petitioner's oath, of the time he formed the intention to become a citizen. In addition to the recitals in his petition, he states orally that he is now thirty-eight years old. If he formed the intention three years before he arrived at the age of twenty-one, it is remarkable, indeed, that he should have taken no steps for seventeen years to put his intention into practical effect. Without evidence to explain this great delay, his conduct is totally inconsistent with his oath, and furnishes a striking illustration of the wisdom of the act in requiring proof. Man, naturally, is social and communicative, and it is indeed rare that when he forms an important determination, or establishes a fixed intent and purpose, he does not in some way communicate it to his friends and associates. When this is done, his acts and declarations are susceptible of easy proof. The mere fact that a minor has resided in the United States for at least five years during his minority, or for three years only before arriving at age, and comes into court, in the former case, soon after attaining his majority, and in the latter soon after he has resided here for the five years provided in the act, and petitions the court for citizenship, is in itself strong evidence that he formed the intent at the time stated in his oath. It is therefore clear to me that the act was not passed for such a case as the one before me. The petitioner could long since have become a citizen, by declaring his intention under the act of 1802. That he has not done so, and did not, under the act of 1824, soon after he became of age, invoke the benefits of that act, is convincing to me that this is but an expedient to procure a certificate of citizenship upon a minor's petition, in order to get rid of the two years' delay incident to declaring his intention, according to the act of 1802. For weeks our court room has been densely packed with petitioners for citizenship, taxing to the utmost the entire official force of the court to pass upon the petitions. A large portion, indeed, I may say, the majority, of the applications are based upon minors' petitions, while many of the petitioners are over thirty years of age. To demand audience for such petitions, without evidence to explain the delay, is an insult to justice; and it is high time that a decided halt be called to those indulging in such pernicious efforts. I am disposed to be liberal in the construction of our naturalization laws, and to confer their provisions upon all who establish a right to them. But in the case before me, and those cases of like character, my plain duty is to dismiss the petitions, and, in this way, compel the applicants to declare their intentions in such form as to show the time when the intention to become a citizen was actually formed."

In *Walker v. Walker* decided by the New York Court of Appeals on the 5th ult., it was ruled that a party to an equity cause who is in contempt, will not be heard until the contempt is purged. The facts of the particular case were these: In an action for divorce the defendant was ordered to pay alimony, upon which he left the State, and an order was therefore